Supreme Court, U. S.
FILED
MAR 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1372

ALDENS INC.,

Petitioner,

vs.

THOMAS J. MILLER as ATTORNEY GENERAL of the STATE of IOWA, and as ADMINISTRATOR of the IOWA CONSUMER CREDIT CODE, SENATE FILE 1405, 65th GENERAL ASSEMBLY, 1974,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Aldens, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on December 7, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (A. p. A-19),[1] is not officially reported; the opinion of the United States District Court for the Southern District of Iowa, Central Division, is reported at 466 F. Supp. 379 (1979). (A. p. A-1).

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[1] Reference to "A" pages are to the pages in the Appendix attached to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1979. Aldens did not file a Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the interest of a state in "protecting" its citizens from the finance charges (usury rates) allowed by a sister state outweigh the admitted burden on interstate commerce of a pure interstate mail order trader caused by the proliferation of such rate regulation among the several states, and particularly in view of this Court's decision in *Marquette National Bank* v. *First of Omaha Corp.*,[2] which allows the avoidance of such state regulation by the use of national bank interstate credit cards.

2. Does the due process clause prohibit a state from regulating the terms of the extension of credit to its citizens by a pure interstate mail order house domiciled in a sister state where the interstate trader has no nexus with the regulating state.

CONSTITUTIONALPROVISIONS AND STATUTES INVOLVED.

Article I, Section 8, Clause 3 of the Constitution of the United States provides:

> "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..."

The Fourteenth Amendment of the Constitution of the United States provides at Section 1:

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[2] *Marquette National Bank* v. *First of Omaha Corp.*, et al., 439 U.S. 299, 58 L.Ed.2d 534, 99 S.Ct. 540 (1978).

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal Truth-in-Lending Act, Pub. L.No. 90-321, Title I, provides at Section 111(b), 15 U.S.C. § 1610(b) (1968):

> "(b) This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope, or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply."

The Iowa Consumer Credit Code, § 537.2201, *et seq.*, *Code of Iowa* 1977, provides:

> *"537.2202 Finance charge for consumer credit sales pursuant to open end credit.*
>
> 1. With respect to a consumer credit sale made pursuant to open end credit, a creditor may contract for and receive a finance charge not exceeding that permitted in this section.
>
> * * *
>
> 3. If the billing cycle is monthly, the charge may not exceed an amount equal to one and one-half percent of that part of the maximum amount pursuant to subsection 2

which is five hundred dollars or less and one and one-fourth percent of that part of the maximum amount which is more than five hundred dollars. ***"

"537.2402 Finance charge for consumer loans pursuant to open end credit.

***

3. If the billing cycle is monthly, the charge may not exceed an amount equal to one and one-half percent of that part of the maximum amount pursuant to subsection 2 which is five hundred dollars or less and one and one-fourth percent of that part of the maximum amount which is more than five hundred dollars. ***"

STATEMENT

The District Court below, in purporting to weigh the state interest in regulation against the national interest in free interstate commerce, said:

> "It suffices to note that it is necessary for the states to enact reasonable consumer credit legislation to protect this public interest, for '*in the power of the lender to relieve the wants of the borrower lies the germ of oppression.*'"[3] (emphasis supplied). (A. p. A-11)

With this amazing statement, the District Court below disposed of Aldens' contention that the national interest in free interstate commerce outweighs the interest of the state in "protecting" its citizens from "usury".

[3] *Aldens, Inc.* v. *Miller*, 446 F. Supp. 379, 384 (US D.C. Iowa 1979) citing 45 Am.Jur.2d, Interest and Usury, § 4.

In three previous Aldens cases to reach the Courts of Appeal,[4] Aldens has been told that the national interest in unfettered interstate commerce must be balanced with the interest of the state in regulating commercial credit transacitons of its citizens with a pure interstate trader regulated under the laws of a sister state. In none of these cases have the Courts attempted to analyze the supposed state interest to be weighed, with the exception of Judge Gibbons' remarks in *Packel, supra*, that such interest has never been questioned in previous cases.

In this case, however, Aldens attempted to have the Court give serious consideration to the nature of the state interest and to analyze whether or not the old laws based on old concepts of usury were effectuating the public policy which they sought to carry out. Instead of considering the numerous authorities on the question, the District Court came forth with the "germ of oppression" statement above quoted, and this statement was agained quoted by the Eighth Circuit Court of Appeals affirming.

This ancient dictum whose primary source is lost in the medevial mists is the sole authority on which the Iowa District Court and the Eighth Circuit depend for the finding that the State of Iowa has a "legitimate Interest" in protecting its citizens from the finance charges allowed by the statutes of a sister state which outweighs the admitted and substantial burden on interstate commerce resulting from this attempted regulation.

[4] *Aldens, Inc.* v. *Packel*, 524 F2d 38 (3rd Cir. 1975); cert. denied, 424 US 943 (1976).

Aldens, Inc. v. *LaFollette*, 552 F2d 745 (7th Cir. 1977); cert. denied, 434 US 880 (1977).

Aldens, Inc. v. *Ryan*, 571 F2d 1159 (10th Cir. 1978); cert. denied, 47 U.S.L.W. 322 (U.S. Oct. 3, 1978, No. 78-33).

The dictum when traced to its secondary source is textually demonstrated to be erroneous and long-abandoned by the writers and authorities in the field.

Taken from Ruling Case Law published in 1921 this "germ of oppression" quotation gives an 1819 New York case as authority,[5] but is immediately followed by this statement: "This view, carried to its extreme, and finding support in the *discredited theory* that money, being barren, cannot beget money, at one time led to the prohibition of all interest." (emphasis supplied). 27 R.C.L. 203.

Thus, a quotation appearing in a work published in 1921 and even then observed to be discredited, is lifted out of context by a writer in American Jurisprudence 2nd, quoted by the District Court of Iowa, picked up and again quoted by the Eighth Circuit Court of Appeals, and becomes the sole weighing of the state's interest in the important balancing test involved.

This Petition represents an attempt by Aldens, a "paradigm interstate trader",[6] to have this Court accept jurisdiction of important constitutional questions of first impression. Aldens seeks the protection of the commerce and due process clauses against "a virtual welter of complicated obligations of local jurisdictions."[7] which several Courts (including the District Court here) have conceded constitute a burden on interstate commerce. It seeks to have this Court balance the interest of

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[5] *Dunham* v. *Gould*, 16 Johns 367 (1819, pub. 1837).

[6] *Aldens* v. *LaFollette*, 552 F2d 745, 751 (7th Cir. 1977), cert. denied, 434 US 880 (197).

[7] *National Bellas Hess, Inc.* v. *Illinois*, 386 US 754 (1967), 18 L.Ed2d 505, 87 S Ct. 1389.

unfettered interstate commerce against the supposed interest of the several states in "protecting" their citizens from evils of "usury", i.e. the open end retail commercial finance charges permitted by sister states. All Courts agree that this balancing must be done, but none have so far done it, other than to jump to the unsupported conclusion, based entirely upon old prejudices, that the regulation of usury is an important state interest.

No Court has yet weighed in the balance of unburdened interstate commerce vis-a-vis the state interest, the fact that this Court in *Marquette National Bank* v. *First of Omaha Corp., supra,* found the state interest insufficient to overcome the right of a national bank to ignore a state's regulatory rights. (The fact that a federal banking statute was there involved is not relevant to this inquiry).

No Court which has considered the question has as yet inquired what this interest is or considered the importance and effect of adequate finance charges on the consumer and, thus, on interstate commerce. No Court has considered money and credit to be a commodity, as entitled to protection from state protectionist regulation, as milk or apples. No Court has as yet considered the effect of *Marquette, supra*, on the abilty of the states to continue this protectionist policy in favor of local merchants. The lower federal Courts which have considered the question have brushed aside this Court's decision in *National Bellas Hess* v. *Illinois*, *supra*, as a "tax case".

This case and its sister cases represent the farthest advance of state power to regulate interstate commerce, or as one District Court said, "There appears to be no reported case upholding state regulation of interstate commerce where the local activities of the business concerned are as scanty as they are here."[8]

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[8] *Aldens, Inc.* v. *Packel*, 379 F. Supp. 521 (M.D. Pa. 1974).

The Circuit Courts in their decisions on Aldens' pleas have demanded a balancing test, a balancing of state and federal interests both as to the commerce and due process issues, but none of them have considered the applicable socio-economic arguments which show the *de minimis* nature of the State's interest now further perforated by *Marquette*.

The due process interests of Aldens and the more than 6,000 mail order traders similarly situated require a balancing of interests similar to those required under the commerce clause.

Finally, the Court of Appeals misinterpreted §111(b) of the Federal Truth-in-Lending Act as an indication of congressional intent to abdicate to the states the control of finance charges on purely interstate transactions, rather than as a provision to preserve those regulations of such charges which were otherwise valid under the commerce clause.

The Facts of the Case.

The facts are stipulated. Aldens is an Illinois corporation with its sole physical location in Chicago. Since 1902 it has been engaged as a general retail mail order merchandiser soliciting customers in all states exclusively by means of catalogs mailed from Chicago.

The District Court stated at p. 380, 466 F. Supp. 379 (1979)*;

> "* * * Aldens does not have any office, distribution house, sales house, warehouse, or any other place of business in Iowa nor does the company advertise its merchandise for sale in Iowa newspapers, on billboards in Iowa, or by placing advertisements with Iowa radio or television stations. There is no telephone listing for the company in the state. No agent, salesman, canvasser, solicitor, or any other type of representative exists in Iowa to sell or take orders, to deliver or service the merchanidise sold by Aldens. The company does not own any real or personal property in Iowa." (A. p. A-2).

In short, Aldens has no "nexus" with the State of Iowa sufficient to support state regulation, even those minimum connections held sufficient in *National Georgraphic Society* v. *California Board of Equalization*, 430 US 551 (1977).

Alden's national credit agreement provides that it is an Illinois contract governed by Illinois law. Under an identical factual situation, the Third Circuit in *Packel* conceded that "The contracts in issue here are substantially Illinois contracts." Illinois specifies a monthly finance charge at an annual rate of 12% on balances over $350 and 21% for those below that figure. This agreement complies with Illinois law and the Federal Truth-in-Lending Act, 15 USC §§ 1601-65. It does not comply with the 18% maximum rate on the first $500 and 15% on the excess specified by the Iowa Consumer Credit Code. it may be noted, however, that the Illinois law requires a lower finance charge on balances between $350 and $500 than does the Iowa law.

In adopting a special credit agreement for Iowa credit sales pending the outcome of this litigation, Aldens has incurred substantial costs for direct loss of revenues because of Iowa's finance charge rates, but more importantly has sustained and will sustain greater losses for preparing special catalogs and materials showing the Iowa credit terms, and for special computer processing and handling of costs associated with Iowa Accounts. It should also be noted this is not as simple as merely printing one sheet additional for the Iowa catalog, as the catalogs are printed in bundles of 24 pages which must be entirely reprinted. There is a loss of revenue associated with using additional pages of a catalog for credit terms rather than for merchanidse advertising.

On the basis of these facts, Petitioner sought declaratory judgment that the finance charges permitted by the Iowa Consumer Credit Code could not constitutionally be applied to such an interstate trader.

The Decision of the District Court.

In none of the previous Aldens' decisions either in the District Courts or in the Circuits did Aldens bring to the Courts' attention the important socio-economic facts bearing upon the question of the right of the states' citizens which the states sought to protect. The decisions were largely on purely constitutional grounds. In this case before the District Court and the Circuit Court, Aldens called these facts to the courts' attention and sought to have the Courts undertake a balancing of interests which they state is the test. Instead of considering these authorities, the Iowa District Court made certain analyzing statements which are demonstrably based upon false and ancient prejudices. These statements were reiterated by the Eighth Circuit Court of Appeals without judicial analysis. The Iowa District Court correctly stated that "The issue is not one of blanket limitations on state power, but one of balancing the interests involved." 466 F. Sup. 379, 383. (A. p. A-9).

The Court stated again correctly that the question of whether or not the Iowa Consumer Credit Code imposes an undue burden on interstate Commerce "hinges on a balancing of the federal interest in the unrestricted flow of commerce among the several states with the state's interest in the area of consumer credit transactions." 466 F. Sup. 379, 383. (A. p. A-9).

Having correctly stated the issue, the Iowa Court without citation of any authority or demonstrating an understanding of the nature of money and credit, states that "Interest in the State of Iowa in protecting its citizens from usurious interest rates in consumer credit transactions is considerable." 466 F. Sup. 379, 384. (A. p. A-11).

The Court then proceeds for its sole citation of authority to make the "germ of oppression" statement quoted above.

The Iowa District Court goes on to hold as a conclusion of law that the "state has a legitimate concern to shield its residents from usurious interest charges affixed to their consumer credit

transactions with interstate sales of merchandise; and, this is an interest which the state can safeguard by means of legislative process notwithstanding the fact that the specific state action may have an effect on the interstate sales of the foreign seller." 466 F. Sup. 379, 385. (A. p. A-14).

The Court asserts that "Iowa has a demonstrably valid state interest in regulating the cost of credit available to its residents" (A. p. A-16) without demonstrating what this interest is.

The Iowa District Court further held that the Federal Truth-in-Lending Act expressly recognizes the necessity of state regulations of interest rates in the field of consumer credit.

The Iowa District Court further found that Iowa is not discriminating against interstate commerce through operation of its Consumer Credit Code "for it is manifest that interstate mail order companies have access to the Iowa market on the very terms as any other seller, whether or not the particular seller is physically located in the state;", (A. p. A-11) again ignoring the unrefuted evidence on this question.

The Decision of the Court of Appeals.

The Court of appeals affirmed, relying almost entirely upon the decision of the District Court on the merits and on the decision of three other Circuits which have previously considered the question. In fact, the *Packel* Court is the only Circuit which has seriously considered the pure constitutional questions raised (aside from the balancing here urged), and the other District Courts and Circuits have satisfied themselves with following the Packel reasoning.

REASONS FOR GRANTING THE WRIT.

I.

The Courts Below In Upholding the Iowa Statute Failed To Balance the Federal Interest In the Unrestricted Flow of Interstate Commerce Among the Several States With the State's Interest in the Area of Consumer Credit Transactions, and In

Considering the Federal Interests Outweighed, Used Outmoded and Discredited Economic and Social Considerations, While Attaching Insufficient Weight to the Burden on Interstate Commerce.

None of the Courts of Appeal which have considered the question have appeared to realize that credit is a commodity, just as money, and the use of money (credit) is a commodity. As a commodity, its free movement in commerce is entitled to the same commerce clause protection that this Court has afforded milk or apples.

The commerce clause not only serves as a positive affirmation of federal authority, but necessarily acts as a brake on state power. It, thus, has a clear and well-understood negative implication. Without the commerce clause, each state would prohibit entrance of products from other states or admit them solely on conditions.

As Prof. Schwartz states in his Article at 74 Northwestern University Law Review 409:*

> "*** This is 'precisely the sort of [economic] Balkanization *** that the Constitution sought to end.' It reflects an 'alertness to the evils of economic isolation and protectionism.' The states may shelter their people from menances to health, safety, and fraud, but they lack 'power to retard, burden, or constrict the flow of commerce for their economic advantage.' The very purpose of the commerce clause was to set up a free trade area among the states, amounting to a virtual 'national' "common market".'
>
> "Although the commerce clause does not specifically forbid the states to act, its whole purpose was to rescue commerce from the 'perpetual jarring and hostility' resulting from the conflicting regulations of different states. *** (Omitting footnotes).

* *Commerce, The States, and The Burger Court*, by Bernard Schwartz, 74 Northwestern 409, 410-411 (1979).

Cooley v. *Board of Wardens*, 53 US (12 How.) 299 (1851), is still the leading case, and the test there set forth is still followed by this Court. The states have power to enact regulations inhibiting commerce if the type of regulation at issue does not require national uniformity and if the state's interest in the regulation outweighs the national interest in free commerce.

As this Court recently stated in *Raymond Motor Trans., Inc.* v. *Rice*, 434 US 429, 441 (1978): "The judicial inquiry involves consideration of the weight and nature of the state's regulatory concern in light of the extent of the burden imposed on interstate commerce." Evenhanded state regulations to effectuate "a legitimate public interest" (*Raymond, supra)* where its effects on interstate commerce are only incidental will be upheld unless the burden imposed on commerce is clearly excessive in relation to the local benefits.

Let us inquire then, as Aldens sought to do in the lower Courts, as to whether or not the state statute involves regulation of a *legitimate* public interest.

The State Interest

The state interest is said to be the regulation of usury. Aside from characterizing it as a "legitimate state interest" and stating that "the state has a legitimate concern to shield its residents from usurious interest charges affixed to their consumer credit transactions with interstate sellers of merchandise;" neither of the Courts below gives any reason why the state has such an interest aside from a quotation from 45 Am.Jur.2d, *Interest and Usury*, § 4.

In *Aldens* v. *Ryan, supra*, this Court was presented for the first time with a Brief of the Illinois Retail Merchants Associa-

tion as *amicus curiaae* in support of the Petition for Writ of Certiorari. Neither the Circuits nor the District Courts in *Packel, LaFollette* or *Ryan* were presented with these arguments. However, the lower Courts here were presented with these arguments. The Court's attention is urgently invited to the *amicus curiae* Brief.

Strong policy reasons compel the conclusion that uneconomic finance charge rates should not be forced upon interstate traders who deal with Iowa consumers in interstate commerce.

A retailer faced with uneconomic finance rates mandated by statute will either increase the cash price of goods, restrict the availability of credit, or both. Dr. Paul A. Samuelson, a Nobel Prize winner in the field of economics, has considered the argument that low rates benefit the consumer and found it without merit.

> "Finally, let me speak to the legitimate concern of consumer groups. With the best intentions in the world, some in that field cannot see the great harm which too-low ceilings do to the equitable and efficient working of the capital markets. This has been proved time and again in connection with deposit-rate interest ceilings, mortgage ceilings and so forth. In many parts of the world progress is still hampered by adherence to medieval attitudes. We live today in an age of high market rates of interest. To keep in perpetuity low ceilings would do more harm in the next twenty years than would have been true in the twenty years following 1929. After consulting with numerous other economists in the field of economics, I have satisfied myself that the proposed maximum rate schedules of the proposed Uniform Consumer Credit Code are schedules that the economy can live with—which is more than can be said for the hodgepodge that has hitherto characterized our history." (Statement of Dr. Paul A. Samuelson in Major Statements in Support of the Uniform Consumer Credit Code filed with the Massachusetts Committee on the Judiciary, January 29, 1969; Boston: National Conference of Commissioners on Uniform State Laws, Chicago, Illinois, 1969).[10]

The use of retail revolving credit plans for a substantial portion of the public's purchase of goods is essential to the continued development of the economy. By enhancing purchasing power, these plans facilitate the production and distribution of goods on a mass scale, thereby making it possible for such goods to be offered at a lower unit cost to the consumer.[11]

The operation of revolving credit plans, however, necessarily involves substantial costs including the expenses of opening and maintaining the account, borrowing funds to finance the account at rates of interest which now approximate 15%, collecting the account and the cost of bad debt. All of these costs incident to these plans are necessary in order to extend to the consumer the convenience, flexibility and many other advantages which revolving credit offers.

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[10] The UCCC, a model code drafted by the National Conference of Commissioners on Uniform State Laws recommended revolving credit of 2% per month on balances up to $500 and 1-1/2% per month on balances in excess of $500 at the time it was drafted. These rates recommended at a time when interest rates were substantially lower than they are now, are greater than those charged by Aldens under Illinois law.

[11] *Consumer Installment Credit,* Federal Reserve System, 1957, Vol. 1., Part 1, p. 21; H.R. Rep. No.1040, 90th Cong., 1st Sess. 10 (1967).

Contrary to popular belief, credit revenues derived from application of the rates required by Iowa and even Illinois are below the costs of operating retail credit programs. This is the result of two studies conducted by national acounting firms.[12]

Furthermore, the losses sustained in operating a retail revolving credit plan are greater among mail order retailers because their cost of credit is higher. This is attributable to more expensive collection procedures and higher bad debt caused by distance and the fact that the mail order retailers traditionally serve lower-income, higher-risk customers.

All other studies in this field in the last twenty years confirm the fact that consumer credit at reasonably-high rates is the most desirable for low income groups and that its withdrawal or the mandating of low rates harms low-income groups the most.[13]

These articles have been called to the lower Court's attention at least in this case, but have been ignored, the Court preferring to rely upon the ancient dictum above quoted.

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[12] Touche, Ross, Bailey & Smart, *Economic Characteristics of Department Store Credit*, National Retail Merchants Association (1969); Touche Ross, Bailey & Smart, *Study of Consumer Credit Costs in Department Stores*, National Retail Merchants Association (1963).

[13] See, *An Empirical Study of the Arkansas Usury Law: "With Friends Like That . . .,"* 1968 University of Illinois Law Forum at pp. 581 and 588; *Retail Store Credit Card Use in New York*, Robert P. Shay and William C. Dunkelberg in cooperation with Touche Ross & Co., Graduate School of Business, Columbia University (1975).

Congress has noted that ".. the availability of credit has a profound impact on an individual's ability to exercise the substantive civil rights guaranteed by the Constitution."*

In this context, where a retail merchant is faced with uneconomic finance charge limitations, he will severely restrict or curtail the availabilty of credit, as the authors of the article in the University of Illinois Law Forum, *supra*, p. 566, state:

> "The principal result of lowering the interest rate must be a limitation on the availability of credit. If the demand for credit remains constant, the net result is that credit is made unavailable to some portion of the community. Potential borrowers of a lower 'credit worthiness' are thus cut off from the legitimate loan market."

Although low income Iowa residents sometimes cannot get a Mastercharge or Visa Credit Card from an Illinois bank which allow use of the finance charges of Illinois under *Marquette*, they can, of course, go to a small loan company in Iowa and borrow money at rates up to 36% permitted by Iowa law. Why, then, is maintaining the Iowa consumer credit rate to 18% so important to the State of Iowa? Does not this indicate protectionism?

It should be evident from an examination of the articles readily available and called to the attention of the Courts below, that there is in fact no "legitimate state interest" in this field, at least insofar as denying the use of the rates mandated by a sister state are concerned on transactions arising under contracts of the law of that state.

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* H.R. Rep. No.94-210, p. 3., quoting Arthur P. Fleming, Chairman, U.S. Commission on Civil Rights In Testimony Before the Consumer Affairs Subcommittee.

The Burden On Interstate Commerce

Not only did the lower Courts weigh too heavily the state's supposed interest in balancing the interests involved, they gave insufficient consideration to the admitted burden on interstate commerce which such regulations entail. These burdens have been identified by this Court in *National Bellas Hess, supra*, as "a vitual welter of complicated obligations on local jurisdictions", and have been conceded in the opinions of the Courts of Appeal in the other Aldens cases. As noted, these burdens constitute substantial economic injury to Aldens and to the mail order retailers. They have, in fact, forced many small retailers to the sole use of national credit cards, frequently issued by national banks which may use foreign credit rates with impunity.

However, it is more than economic injury to Aldens and the catalog houses that is threatened by the decision below. What is at stake is the preservation of the most efficient retail distribution system in the World and the existence of that highly-competitive interstate market contemplated and protected by the Constitution. Under such circumstances, the finding of a legitimate local purpose, particularly where it is not based upon any modern authority, is insufficient to overcome a constitutional challenge. *Raymond Motor Transp., Inc., supra.*

The Iowa District Court followed by the Court of Appeals, found that Iowa is not discriminating against interstate commerce "For it is manifest that interstate mail order companies have access to the Iowa market on the very terms as any other seller, whether or not the particualr seller is physically located in the state." (A. p. A-11). This is simply not true. Aldens has none on the advantages of a physical presence within the State of Iowa. It has no retail department store where the goods may be observed by the consumer, and where short-term low-price sales may be conducted. It has none of the advantages of local advertising, local political presence and the advantages brought by local employees. It is not competing on the same terms as

local merchants. It relies upon the competitive advantage of lower-priced merchandise distributed by mail to the homes of customers, many of whom live miles from the retail markets. A decrease in the finance rates permitted will only require Aldens to increase its prices and withdraw credit from low-income groups, thus further losing competitive equality with local merchants.

In his opinion in *Packel*, Judge Gibbons notes the burden, stating: "... such laws do burden interstate commerce, and ... the burden is increased by lack of uniformity."

Aldens only quarrels with Judge Gibbons' conclusion that because of the historic recognition that states may enact varying usury laws any change must come from Congress, despite the burden on interstate commerce.

A balancing of interest necessarily involves an analysis of those interests and Aldens submits that the federal Courts must move into the second half of the Twentieth Centry in considering the importance of such laws to the states, and their effect upon commerce. A weighing of interests involves policy considerations and cannot be left solely to Congress when there is an admitted burden on interstate commerce.

Constitutional Principles Involved

The constitutional principles involved are well-understood. They have been carefully enunciated by Judge Gibbons in *Packel* and followed by the three other Courts of Appeal as they apply to this case. They are generally well-summarized by Prof. Schwartz in the Northwestern Law Review Article above quoted.

Aldens does assert that *National Bellas Hess, supra,* and *Allenberg Cotton Co.* v. *Pittman*, 419 US 20 (1974) should apply. The mere fact that *National Bellas Hess* was a tax collection case and that the power of the states in such area is more closely scrutinized does not change the principles there enunciated.

No useful purpose would be served by extending this Petition by extensive quotations from such authorities. Aldens finds Judge Gibbons' analysis of the commerce clause both learned and persuasive.

In that case, Aldens apparently asserted that the choice of law made by the state discriminated against persons engaged in interstate commerce in favor of local interests. It still makes this assertion, and submits that the state regulations are no different than those declared unconstitutional by this Court in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 US 366 (1976), involving protectionist milk ordinances, and *Hunt* v. *Washington State Apple Advertising Commission*, 432 US 333 (1977), involving regulation of apples. The mere fact that such local protectionism is justified by the ancient prejudices against usurers does not change the situation. Indeed, at the oral argument before the Eighth Circuit Court of Appeals, the Iowa Assistant Attorney General urged that the next concern which might seek to do business with Iowa citizens might not be an Aldens, a legitimate mail order house from Chicago, but a "merchant from Venice", or words to that clear effect, thus invoking the ghost of Shylock.

Aldens also relies upon item 2(c) of Judge Gibbons' analysis that a non-discriminatory state choice of law, in an area where national uniformity may not be essential, imposes a burden on interstate commerce in excess of any value attaching to the state's interest in imposing its regulation. In fact, at this time, this is Aldens' principal complaint.

The assertion of the District Court here that § 111 of the Federal Truth-in-Lending Act "expressly recognizes the necessity of state regulations of interstate rates in the field of consumer credit" (466 F. Supp. 384) (A. p. A-11), is not only beside the point, but reads a great deal more into the Truth-in-Lending Act than Congress intended. Sec. 111 (15 USC § 1610(b)) does no more than indicate that the federal Act does not annul state

Acts regulating finance charges. It is a precaution written into the Act so that federal Courts could not assert that the Federal Government had occupied the field. Thus, state laws are still valid insofar as they function within the state. This does not mean that Congress intended to repeal the operation of the commerce clause of the Constitution. State laws creating an undue burden on interstate commerce in excess of any value attaching to the state's interests are nevertheless unconstitutional.

II

Aldens Has An Insufficient Nexus With The State of Iowa To Allow Iowa To Regulate an Illinois Contract Consistent With Due Process Requirements.

The District Court, following the *Packel* decision, asserts that Aldens has sufficient nexus with the State of Iowa to allow the Iowa laws regulating finance charges to attach to what are concededly Illinois contracts. This connection with the state is identified by Judge Gibbons in *Packel* as a systematic solicitation of Iowa residents by the Illinois company. Here, there is no real connection with the State of Iowa whatsoever and substantially less than was present in *National Geographic, supra,* where the nexus requirement was diluted more than in any preceding case. Indeed, Prof. Schwartz inquires "whether a case such as *National Geographic* is consistent with the free trade purpose of the commerce clause."

However, in the last analysis, the state's interest must be balanced in considering due process requirements, much as it must be balanced in commerce clause consideration. Here, the District Court asserted that Aldens "ignores the state interest Iowa seeks to protect through the enactment of the Iowa Consumer Credit Code", and refers to the "legitimate state interest" sufficient to warrant an enactment of the law. Aldens did not ignore the state interest, but sought to point out to the lower Courts here that that state interest was, in fact, *de*

minimis in view of modern concepts of economics, the realities of interstate credit and the decision of this Court in *Marquette National Bank*. Even though the due process clause defines a low threshold of state interest sufficient to justify exercise of the state's authority, there is no showing that this threshold has been met sufficiently to allow Iowa to attach its regulations to Illinois contracts and override the laws of Illinois.

What has been said above relative to the weighing of the interest of the State applies equally here in considering the due process considerations.

CONCLUSION

As this Court has thrice denied Alden's Petitions for Certiorari in nearly identical cases, some might feel this final attempt to be an exercise in futility. The three previous attempts should not, however, lead this Court to reject this Petition out of hand. On the contrary, the case cries out for review by this Court and Aldens' persistence is only one index of the real burden on interstate commerce created by the virtual welter of the regulation going beyond the borders of the states. In addition, Aldens' thrust is somewhat different here. Instead of emphasizing due process concepts, as in *Packel*, or urging that the burden falls directly and impermissibly on pure interstate commerce, as in *LaFollette*, Aldens urges here a real weighing of the interests involved, a true balancing test, and suggests that it is time for the Courts, instead of looking back toward 1819 and beyond in a search for authority, to look at today's market place, with today's interest rates and today's interstate credit transactions.

In rejecting the argument that allowing the use of foreign credit cards carrying foreign state's interest rates would impair the ability of the states to enact effective usury laws, this Court remarked in *Marquette National Bank* that "This impairment may, in fact, be accentuated by the ease with which interstate

credit is available by mail through the use of modern credit cards."

Why then does the interest of the state in "protecting" its citizens by these usury laws rank so high as to outweigh an admitted serious burden on interstate commerce and to overcome traditional concepts of due process?

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 74-182-2

ALDENS, INC.,
an Illinois corporation,
Plaintiff,

v.

THOMAS J. MILLER, as
Attorney General of the
State of Iowa, and as
Administrator of the
Iowa Consumer Credit Code,
Senate File 1405, 65th
General Assembly, 1974,
Defendant.

MEMORANDUM AND ORDER

(Filed March 5, 1979)

Plaintiff Aldens, Inc. (herein Aldens) filed a complaint on July 12, 1974, seeking a declaratory judgment that certain provisions of the Iowa Consumer Credit Code (now Chapter 537 of the Code of Iowa) were unconstitutional as violative of the Commerce Clause of the Fourteenth Amendment. The defendant, the Attorney General of the State of Iowa, as Administrator of the Iowa Consumer Credit Code, filed a motion to dismiss on September 30, 1975, urging the Court to invoke the "abstention doctrine" in light of a state action filed

September 29, 1975 by the defendant to enjoin the plaintiff from assessing, collecting, or receiving a finance charge in excess of that provided in Chapter 537. The Court denied the defendant's motion in an order dated November 4, 1975, as the issue before the Court involved the constitutionality of Chapter 537 and is not possible state court construction.

Because the amount in controversy exceeds the sum of $10,000 and the action involves the validity of a state statute under the Constitution, the Court finds it has jurisdiction pursuant to 28 U.S.C. § 1331(a).

The complaint seeks a declaration of the rights of parties pursuant to the authority granted under 28 U.S.C. § 2201 and Rule 57, F.R.Civ.P. Accordingly, the Court finds that the complaint may be brought as a declaratory judgment action in that an actual controversy exists between the parties.

This cause of action came on for trial before the Court on March 22, 1978. There were no significant facts in dispute as a stipulation was agreed to by the parties, and the Court now enters its findings and conclusions in accordance with Rule 52, F.R.Civ.P.

Findings of Fact

Aldens is a general retail merchanidse business located in Chicago, Illinois, and sells its goods solely by mail order to purchasers who reside in all fifty states, including, Iowa. Aldens does not have any office, distribution house, sales house, warehouse, or any other place of business in Iowa nor does the company advertise its merchandise for sale in Iowa newspapers, on billboards in Iowa, or by placing advertisements with Iowa radio or television stations. There is no telephone listing for the company in the state. No agent, salesman, canvasser, solicitor, or any other type of representative exists in Iowa to sell or take orders, to deliver or service the merchandise sold by Aldens. The company does not own any real or personal property in Iowa.

Aldens mails catalogs to certain Iowa residents approximately four times per year, supplementing these with "flyers" approximately six to eight times per year. Included in the catalogs are application forms for credit accounts with Aldens, and, upon completion of the forms, Iowa residents mail them to the plaintiff's Chicago headquarters, the only office which can extend credit to purchasers. The credit agreement used by Aldens states that it is an Illinois contract governed by Illinois law, and provides for a monthly finance charge of 1.75 percent on the portion of the average daily balance of the customer's account on amounts of $350 or less for an annual rate of 21 percent, and a monthly finance charge of one percent on that portion of such balance in excess of $350 for an annual rate of 12 percent. These rates are in conformance with Regulation Z promulgated by the Federal Reserve Board under the Federal Truth-in-Lending Act, 12 C.F.R. § 226.7 (1978), and are also in compliance with Illinois law. Albeit, the rates are not similarly in compliance with Chapter 537,[1] which limits the finance charge on consumer

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[1] Section 537.1201 has to do with the territorial application of the Iowa Consumer Credit Code. The pertinent provisions of paragraph 2 of that section state:

> 1. This chapter applies to: . . .
>
> c. Acts, practices or conduct in this state in the solicitation, inducement, negotiation, collection or enforcement of a transaction, without regard to where it is entered into or modified:
>
> . . .
>
> 2. For the purposes of this section, a transaction is entered into or modified in this state if any of the following apply: . . . .
>
> b. In an open end credit transaction:
>
> (1) If the buyer, lessee or debtor is a resident of this state either at the time the buyer, lessee or debtor forwards or otherwise gives to the person extending

credit sales to a maximum of 1.5 percent per month on the first $500 of a customer's annual rate of 18 percent.[2]

Merchandise sold to Iowa purchasers is delivered on an f.o.b. point of origin basis to those customers by deposit in the United States mail, delivery to a common carrier in Chicago, or by shipment from some point outside the State of Iowa. On credit sales Aldens pays the shipping, handling, and transportation costs, and then bills the customer for those charges.

Aldens retains only a purchase money security interest in any merchandise sold pursuant to the credit agreement with its purchasers. The purpose of this provision of the credit agreement is to conform to Aldens accounting practices and to inform purchasers that the company has such a security interest to the extent of the unpaid balance of the merchandise. Aldens does not file any financing statements or other interest documents with the State of Iowa, nor does the company enforce any security interest in such merchandise. Aldens has a security interest in unpaid-for merchandise only to the extent provided by law. In the past, however, Aldens has employed Iowa collection agencies to collect bad debts in the event an Iowa customer failed to make at least a $5 payment on his account in the six-month period. The company has indicated that it may or may not continue this practice after the conclusion of this litigation.

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credit a written or oral communication of his intention to establish the open end transaction, or at the time the person extending credit forwards or otherwise gives to the buyer, lessee or debtor a written or oral communication giving notice to the buyer, lessee or debtor of the right to enter into open end transactions with such person, unless the parties have agreed that the law of the residence of the buyer, lessee or debtor applies in which case that law shall apply.

[2] Aldens has adopted a new credit agreement for its Iowa customers, pending the decision in the present case, which complies with the provisions of Chapter 537.

Aldens is not required to collect or remit Iowa sales or use taxes, or to pay any other Iowa taxes.

In 1976, approximately 1.72 percent of Aldens sales were made to Iowa purchasers and approximately 1.42 percent of this amount was derived from credit sales. The number of Aldens active credit accounts in Iowa for 1976 totalled approximately 20,200 and the average credit account balance equaled approximately $178.22.

Conclusions of Law

Similar issues and contentions of the parties before the Court have been examined by the Third Circuit in *Aldens, Inc.* v. *Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); the Seventh Circuit in *Aldens, Inc.* v. *LaFollette*, 552 F.2d 745 (7th Cir. 1977), *cert. denied*, 434 U.S. 880 (1977), and the Tenth Circuit in *Aldens, Inc.* v. *Ryan*, 571 F.2d 1159 (10th Circ. 1978), *cert. denied*, 47 U.S.L.W. 322 (U.S. Oct. 3, 1978) (No.78-33). In each case the court resolved the issue adversely to the constitutional claims of Aldens. The Court arrives at the same conclusion as did those three courts and therefore dismisses the plaintiff's cause of action.

A. Commerce Clause

The plaintiff sets forth a two-pronged attack against the provisions in Chapter 537: one, that the State of Iowa lacks the power to regulate Aldens' purely interstate sales; and, two, that Iowa's regulation of Aldens' interstate sales constitutes an undue burden on interstate commerce.

The *Packel* court articulated a number of categories under which state regulations could be subject to invalidation through the commerce clause[3] and then upheld the provisions of the Pennsylvania Goods and Services Installment Sales Act, 69 P.S. § 1101-2303 (Supp. 1975) as they related to Aldens' transactions with Pennsylvania residents, as Aldens' situation did not fall within the purview of any category. Aldens maintains, however, that *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967) and *Eli Lilly & Co.* v. *Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961) have carved out another commerce clause basis for invalidating state regulations. The underpinning of plaintiff's premise is that the commerce clause prohibits a state from regulating purely interstate sales to its residents, viz., when the foreign seller engages in no local activity in the regulating state. Since the transactions between the company and Iowa residents are said to have no intrastate aspects whatsoever, Aldens argues the operation of Chapter 537 "can only fall directly and impermissibly on interstate commerce itself." Brief for plaintiff at 5. In this regard the Court "need only make a threshold determination that the regulating state is without the power to impose its will on interstate business activity." Brief for plaintiff at 11. This "per se" approach to limitations on the exercise of state power under the commerce clause, however, is without merit, and has been invariably rejected. As the Tenth Circuit observed:

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[3] "We suggest, then, that the commerce clause limits the power of a state to impose its choice of law on any transaction that is within the broad ambit of congressional power to regulate interstate commerce, and

(1) is one in which Congress has made its own choice of law, or

(2) is one in which Congress has made no specific choice of law, but

(a) despite this inaction the nature of the subject matter requires a uniform rational rule, or

(b) the choice of law made by the state discriminates against persons engaged in interstate commerce in favor of local interests, or

(c) a non-discriminatory state choice of law, in an area where rational uniformity may not be essential, imposes a burden on interstate commerce in excess of any value attaching to the state's interest in imposing its regulation."

524 F.2d at 45-46 (footnotes omitted).

> Physical presence of Aldens in Oklahoma is not required to subject its credit rates to state regulation in transactions with Oklahoma residents. . . . The states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of local benefits. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326; *Great Atlantic & Pacific Tea Co.*, v. *Cottrel*, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55; *Head* v. *New Mexico Board*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983.

Aldens, Inc. v. *Ryan, supra* at 1161.

Aldens' reliance on *National Bellas Hess* as controlling the outcome of the present case is misplaced. It is now well-settled that *National Bellas Hess* is considered in the same vein as a tax case,[4] which summons different constitutional considerations for a court than a case which involves the constitutionality of a

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[4] The Seventh Circuit noted:

> Any doubt that *Bellas Hess* was being analyzed as a tax case, even though strictly speaking the duty imposed on Bellas Hess was to collect a tax falling on someone else, was conclusively dispelled by footnote 9. . . . Thus as a *de facto* tax on a purely interstate trader, the legislation in *Bellas Hess* was a *per se* undue burden.

state's regulatory measures.[5] *National Geographic Society* v. *California Board of Equalization,* 430 U.S. 551 (1977); *Aldens, Inc.* v. *LaFollette, supra* at 752-753; *Aldens, Inc., Packel, supra* at 49; *Confidential Tribes of Colville* v. *State of Washington,* 446 F.Supp. 1339 (E.D. Wash. 1978). *National Bellas Hess* merely held that a state could not, consistent with Article I, § 8 of the Constitution and the Due Process Clause of the Fourteenth Amendment, impose the obligation on an out-of-state mail order insurance company to collect a use tax from its customers in the state. *Allenberg Cotton, supra,* and *Eli Lilly, supra,* are similarly inapposite to Aldens' position. The Third Circuit succinctly distinguished those cases by noting the enactment of the Federal Truth-in-Lending Act:[6]

> The most significant difference between cases involving state statutes closing the door to foreign corporations and this case is that here Congress has expressly deferred to the

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Aldens, Inc. v. **Ryan, supra** at 753.

Footnote 9 of the *National Bellas Hess* opinion, in pertinent part, states:

> Strictly speaking, there is no question of the connection or link between the State and "the person . . . it seeks to tax." For that person in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, in *Scripto, Inc.* v. *Carson,* 362 U.S. 207, and in the present case is the user of the goods to whom the out-of-state retailer sells. National is not the person being directly taxed, but rather it is asked to collect the tax from the user. It is, however, made directly liable for the payment of the tax whether collected or not.

[5] Generally speaking, tax statutes enacted by a state are accorded great judicial dubiety for the purpose of commerce clause analysis since "no extraterritorial manifestation of sovereignty, except possibly arrest, is quite so offensive to common notions of its territorial limits." *Aldens, Inc.* v. *Packel, supra* at 43.

[6] Act of May, 1968, Pub.L.No. 90-321, Title I, § 102 *et seq.,* 82 Stat. 146, 15 U.S.C. § 1601-65.

> states on the matter of consumer credit interest rates. Congress having used the legislative scales, there is no need and there may be no room for the kind of judicial weighing which produced one result in *Eli Lilly* . . . and another in *Allenberg Cotton* . . . Even if Congress had not done so, *Allenberg Cotton* is in any event distinguishable from this case because of the significant local impact of the time-price differential paid by Pennsylvania residents and the relatively slight burden on interstate commerce from Pennsylvania's regulation of that differential.

Aldens, Inc. v. *Packel, supra* at 50.

The issue is not one of blanket limitations on state power, but one of balancing the interests involved. This raises the question of whether or not the operation of Chapter 537 imposes an undue burden on interstate commerce. The resolution of this question hinges on a balancing of the federal interest in the unrestricted flow of commerce among the several states with the state's interest in the area of consumer credit transactions.

The purposes of the commerce clause, *inter alia,* include the notions that commercial enterprises in every state are entitled to substantial equality of access to a free national market,[7] and that commercial intercourse should be protected from invidious restraints imposed by the legislatures of the several states.[8] In the case *sub judice,* these purposes are not offended by the provisions delineated in Chapter 537. Adherence by foreign sellers to the maximum interest rate prescribed by the Iowa legislature

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[7] *American Can Co.* v. *Oregon Liquor Control Com.,* 15 Or. App. 618, 517 P.2d 691 (1974).

[8] *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923), *aff'd on rehearing,* 263 U.S. 350 (1923); *Western Union Tel. Co.* v. *Pendleton,* 122 U.S. 347 (1887); *Robbins* v. *Shelby County Taxing Dist.,* 120 U.S. 489 (1889); *Weltonv. Missouri,* 91 U.S. 275 (1875), *Steamship Co.* v. *Portwardens,* 73 U.S. 31 (1867).

does not restrict the flow of commerce between the states in any constitutional sense. A state may regulate intrastate activities occurring in connection with interstate commerce, and such legislation will not be subject to invalidation merely because of its incidental effect or indirect burden on interstate commerce. *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960); *Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346 (1939); *South Carolina Hwy. Dept.* v. *Barnwell Bros.,* 303 U.S. 177 (1938). At the same time, however, if the effect on interstate commerce is unduly burdensome, the state regulation will be struck down. *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959). Consequently, there is a significant distinction between "commerce among the states" and the internal affairs of the state: the federal government is not granted an exclusive dominion over all incidents encompassed within the phrase "interstate commerce" nor are the states endowed with the power to enact conflicting or hostile laws which impermissibly burden interstate business activity.

Aldens argues that the operation of Chapter 537 unduly burdens interstate commerce. This contention has been carefully considered and rejected in the three prior circuit cases, each of which involved Aldens as a litigant attacking statutory provisions substantially similar to Chapter 537. This Court finds the plaintiff's argument without substance and concurs with the reasoning of the Third, Seventh, and Tenth Circuits.

It is true that as a result of the operation of Chapter 537 Aldens and other foreign sellers similarly situated are encumbered to some extent. Aldens would be required to adjust its rates, advertising, credit agreements, and billing statements to conform to Iowa law, thereby increasing Aldens' cost of doing business. Aldens argues that the increased cost of complying with the regulations contained in Chapter 537 seriously discriminates against Aldens' interstate sales to Iowa residents

and thus unduly burdens interstate commerce. But the mere cost of doing business with Iowa residents to interstate sellers does not amount to a substantial burden on interstate commerce. Contrary to Aldens' conclusion, Iowa is not discriminating against interstate commerce through the operation of Chapter 537—for it is manifest that interstate mail order companies have access to the Iowa market on the very terms as any other seller, whether or not the particular seller is physically located in the state.[9]

In contrast to the insubstantial burdens the operation of Chapter 537 imposes on interstate commerce, the interest of the State of Iowa in protecting its citizens from usurious interest rates in consumer credit transactions is considerable. And, it extends to credit sales solicited of and by Iowa residents in Iowa, notwithstanding that the contract terms declare the contract to be governed by the laws of the state in which the seller is located. It suffices to note that it is necessary for the states to enact reasonable consumer credit legislation to protect this public interest, for "in the power of the lender to relieve the wants of the borrower lies the germ of oppression." 45 Am.Jur.2d *Interest and Usury* § 4 (1969). Moreover, the federal Truth-in-Lending Act expressly recognizes the necessity of state regulation of interest rates in the field of consumer credit by providing:

> This subchapter does not otherwise annul, alter, or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges permissible under such laws

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[9] As the defendant points out in its brief, there are other different kinds of sellers—such as the various gasoline companies—currently operating in interstate commerce, which are compelled to follow the diverse interest rate limitations set by the several states.

> in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

15 U.S.C. § 1610(b).

Consequently, it appears that the additional costs imposed on Aldens' interstate transactions with Iowa residents as a result of the operation of Chapter 537 are not sufficient to outweigh Iowa's interest in protecting its residents from usurious interest rate charges. The only burden on Aldens is the incremental cost of complying with the regulations set forth in Chapter 537. This cost is non-discriminatory as applied to interstate sellers since it does not prevent access to or maintenance of sales within the boundaries of the state. Furthermore, this is a type of outlay which, in the operation of the law of supply and demand, may be passed on to the Iowa consumer.

Thus, for the reasons heretofore stated, the Court finds that the effect of Chapter 537 does not impose an undue burden of interstate commerce.

B. Due Process Clause

"The due process clause of the fourteenth amendment limits the power of a state to export its sovereign decisional authority, including its authority to make choices of law, to transactions with which it has an insufficient minimum interest." *Aldens, Inc.* v. *Packel, supra* at 42. At the same time, the due process clause was not designed to curtail the power of a state to enact reasonable regulations governing transactions which enjoy some "nexus" with the state. *Cf. Friedman* v. Rogers, 47 U.S.L.W. 4151, 4156 n.19 (U.S. Feb. 21, 1979) (Nos. 77-1163, 77-1164, 77-1186).

The essence of Aldens' argument parallels its commerce clause contention that the State of Iowa simply lacks the power

to regulate the business transactions of a foreign corporation when there is no physical "nexus" or contact with the regulating state. Aldens concludes the provisions of Chapter 537 offend due process principles since

> Iowa . . . seeks to regulate these clearly interstate transactions by redefining essential elements of contract law. Sec. 537.1201 (Code of Iowa 1977) simply equates mail solicitation of a customer in Iowa with the making of a consumer credit transaction, and states that it is entered into in Iowa regardless of the agreement of the parties. . . . The legislative intent is clear—it proposes to convert what is indisputably an Illinois contract into an Iowa contract, so that Iowa may extraterritorially regulate the out-of-state activities of an out-of-state contract.

Brief for plaintiff at 17.

This position, however, ignores the state interest Iowa seeks to protect through the enactment of the Iowa Consumer Credit Code. And, to this extent, any legitimate state interest is sufficient to warrant an enactment of the state legislature.[10] Accordingly, the question becomes: is there any interest the State of Iowa has in restricting the maximum amount of interest in consumer credit transactions arising out of a systematic solicitation of Iowa residents by a foreign state seller?

The Court finds that the state does have an interest concerning the contractual relations of its residents with foreign mail order business. The state has a legitimate concern to shield its residents from usurious interest charges affixed to their con-

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[10] "Since *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), it has been clear that the due process clause defines a rather low threshold of state interest sufficient to justify exercise of the state's sovereign decisional authority with respect to a given transaction." *Aldens, Inc.* v. *Packel, supra* at 43.

sumer credit transactions with interstate sellers of merchandise; and, this is an interest which the state can safeguard by means of the legislative process notwithstanding the fact that the specific state action may have an effect on the interstate sales of the foreign seller. *Travelers Health Assn.* v. *Virginia,* 339 U.S. 643 (1949); *Hoopeston Canning Co.* v. *Cullen,* 318 U.S. 313 (1943); *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945); *Osborn* v. *Ozlin,* 310 U.S. 53 (1940). Aldens' imposition of a usurious interest charge violates the express public policy of the state that no Iowan shall pay more than that prescribed by Chapter 537 on his consumer credit transaction solicited in Iowa.[11] This concern of the state to prohibit usurious loans to its residents is sufficient to surmount the burdens placed on interstate sellers to conform to the provisions of Chapter 537. Notwithstanding this interest, Aldens' imposition of a usurious interest charge is iniquitous to the extent that any Iowa mail order housing selling similar goods is diadvantaged. Allowing Aldens to charge an interest rate greater than that which any Iowa enterprise is able to impose gives Aldens an economic advantage over the in-state competitor since Aldens may recoup comparatively greater profits on its sales to Iowa residents.

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[11] The purposes and underlying policies of Chapter 537 are contained in § 537.1120(2):

a. Simplify, clarify and modernize the law governing retail installment sales and other consumer credit.

b. Provide rate ceilings for certain creditors in order to assure an adequate supply of credit to consumers.

c. Further consumer understanding of the terms of credit transactions and foster competition among suppliers of consumer credit so that consumers may obtain credit at reasonable cost.

d. Protect consumers against unfair practices by some suppliers, solicitors or collectors of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.

Again, Aldens contends that *National Bellas Hess* controls the outcome of the present case in this regard. An extended discussion in this memorandum is not required for the Third, Seventh, and Tenth Circuit cases herein cited amply canvass the merits of Aldens' argument. It suffices at this point to reiterate that *National Bellas Hess* held only that a state could not impose an obligation on an out-of-state mail order insurance company to collect a use tax from its customers in the state; and, because *National Bellas Hess* is considered a tax case, it triggers a "special due process scrutiny" not properly applicable here.[12]

Since Iowa has a demonstrably valid state interest in regulating the cost of credit available to its residents, the application of the provisions in Chapter 537 do not offend the due process clause.[13]

e. Permit and encourage the development of fair and economically sound consumer credit practices.

f. Conform the regulations of disclosure in consumer credit transactions to the Truth in Lending Act.

g. Make the law, including administrative rules, more uniform among the various jurisdictions.

[12] *See, Aldens* v. *Packel, supra* at 43.

[13] Assuming *arguendo* that the reasoning of *National Bellas Hess* in fact controls the disposition of this case, it nevertheless appears that Aldens' credit transactions with Iowans are subject to the provisions of Chapter 537. The holding of *National Bellas Hess* was predicted on the happenstance that the plaintiff foreign mail order house had no connection whatsoever with the taxing state because, as a prerequisite to the imposition of the tax, due process demands that there be some nexus or "link" between the enterprise and the state whichis not arbitrary or indefinite in character. *National Geographic Society, supra; Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954); *Wisconsin* v. *J. C. Penney,* 311 U.S. 435 (1940). To this extent, the "link" is sufficient if the seller receives any services from the taxing state. *Confederated*

Order For Judgment

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered for the defendant, Thomas J. Miller, as Attorney General of the State of Iowa, and as Administrator of the Iowa Consumer Credit Code, Senate File 1405, 65th General Assembly, 1974, and that this cause of action be dismissed accordingly.

Signed this 2nd day of March, 1979.

BY THE COURT:

/s/ WILLIAM C. HANSON, Senior District Judge

Tribes of Colville v. *State of Washington,* 446 F.Supp. 1339 (E.D. Wash. 1978). In contrast with the mail order house in *National Bellas Hess,* Aldens has previously employed Iowa agencies to collect on various bad debt accounts of Iowa residents and the Iowa courts were available to Aldens in seeking to enforce its contracts. Certainly this utilization of collection agencies might well suffice as a significant and substantial "link" between the state and Aldens for the purposes of due process in the taxing context.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA -
CENTRAL DIVISION

CIVIL ACTION NO. 74-182-2

Aldens, Inc., an Illinois Corporation

vs.

Thomas J. Miller, As Attorney General of the State of Iowa, and as Administrator of the Iowa Consumer Credit Code, Senate File 1405, 65th General Assembly, 1974

JUDGMENT

(Filed March 5, 1979)

This action came on for trial before the Court, Honorable William C. Hanson, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged that judgment is hereby entered for the defendant, Thomas J. Miller, as Attorney General of the State of Iowa, and as Administrator of the Iowa Consumer Credit Code, Senate File 1405, 65th General Assembly, 1974, and that this cause of action is hereby dismissed.

Dated at Des Moines, Iowa, this 5th day of March, 1979.

/s/ James R. Rosenbaum
Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1262

Aldens, Inc., an Illinois Corporation,

Appellant,

v.

Thomas J. Miller, as Attorney General of the State of Iowa; and as Administrator of the Iowa Consumer Credit Code, Senate File 1405, 65th General Assembly, 1974,

Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: November 5, 1979

Filed: December 7, 1979

Before LAY, BRIGHT and McMILLIAN, Circuit Judges.

LAY, Circuit Judge.

Aldens, Inc. appeals an adverse judgment in a suit brought against Thomas J. Miller, Attorney General of Iowa, seeking to have section 537.1201 of the Iowa Consumer Credit Code declared unconstitutional. Aldens, an Illinois corporation, asserts that it operates a mail order business in all 50 states that is purely interstate in nature. The credit agreement it uses, which is the subject of this lawsuit, states that it is an Illinois contract governed by Illinois law. The credit charges comply with Illinois law, but do not comply with rates applicable to open-end credit financing in Iowa.[1] Aldens contends Iowa's limitation on credit charges to Aldens' Iowa consumers constitutes an undue burden on interstate commerce in violation of the commerce clause of the Constitution. Aldens additionally alleges the Iowa Act, as applied to it, constitutes an attempt to exercise legislative authority extraterritorially in violation of the due process clause.

In upholding the Act, the federal district court, Judge William C. Hanson, presiding, relied upon three decisions of our sister circuits in which arguments identical to those Aldens

[1] The stipulation of facts provides:

> Aldens National Credit Agreement provides for a monthly finance charge of 1.75% on the portion of the "Average Daily Balance" of the account in the amount of $350 or less (an Annual Percentage Rate of 21%) and a monthly finance charge of 1% on that portion of such balance in excess of $350 (an Annual Percentage Rate of 12%). These rates are expressed in conformity with Section 226.7(b)(5) of Regulation Z promulgated by the Federal Reserve Board under the Federal Truth-in-Lending Act. These rates are less than the maximum permitted by Illinois law.

Iowa law permits a maximum monthly finance charge of 1.50% on the amount of $500.00 or less, (an annual percentage rate of 18%), and 1.25% on amounts in excess of $500.00, (an annual rate of 15%). Iowa Code Ann. § 537.2202 (1971, 1979 Supp.). Section 537.1201, which is challenged here, deals with the territorial application of these provisions.

makes here were rejected. **Aldens, Inc.** v. **Packel,** 524 F.2d 38 (3d Cir. 1975), *cert. denied,* 425 U.S. 943 (1976); **Aldens, Inc.** v. **LaFollette,** 552 F.2d 745 (7th Cir.), *cert. denied,* 434 U.S. 880 (1977); **Aldens, Inc.** v. **Ryan,** 571 F.2d 1159 (10th Cir.), *cert. denied,* 439 U.S. 860 (1978). Since these decisions, the Supreme Court of the United States dismissed for want of a substantial federal question a case raising similar contentions. **Meierhenry** v. **Spiegel, Inc.,** ____ S.D. ____, 277 N.W.2d 298 (1979), **appeal dismissed,** 48 U.S.L.W. 3216 (Oct. 2, 1979) (No. 79-164).[2]

We find the district court reasoning dispositive of the issues Aldens raises. As Judge Hanson stated:

> The purposes of the commerce clause, *inter alia,* include the notions that commercial enterprises in every state are entitled to substantial equality of access to a free national market, and that commercial intercourse should be protected from invidious restraints imposed by the legislatures of the several states. In the case *sub judice,* these purposes are not offended by the provisions delineated in Chapter 537. Adherence by foreign sellers to the maximum interest rate prescribed by the Iowa legislature does not restrict the flow of commerce between the states in any constitutional sense. A state may regulate intrastate activities occurring in connection with interstate commerce, and such legislation will not be subject to invalidation merely because of its incidental effect or indirect burden on interstate commerce.
>
> . . . .
>
> Aldens argues that the increased cost of complying with the regulations contained in Chapter 537 seriously

[2] We agree with Aldens that the dismissal in **Meierhenry** v. **Spiegel, Inc.,** 48 U.S.L.W. 3216 (Oct. 2, 1979) (No. 79-164), must be read narrowly, and although we give it considerable weight, it does not necessarily represent a decision on the commerce clause and due process issues raised. **See Mandel** v. **Bradley,** 432 U.S. 173 (1977).

discriminates against Aldens' interstate sales to Iowa residents and thus unduly burdens interstate commerce. But the mere cost of doing business with Iowa residents to interstate sellers does not amount to a substantial burden of interstate commerce. Contrary to Aldens' conclusion, Iowa is not discriminating against interstate commerce through the operation of Chapter 537—commerce through the operation of Chapter 537—for it is manifest that interstate mail order companies have access to the Iowa market on the very terms as any other seller, whether or not the particular seller is physically located in the state.

In contrast to the insubstantial burdens the operation of Chapter 537 imposes on interstate commerce, the interest of the State of Iowa in protecting its citizens from usurious interest rates in consumer credit transactions is considerable. And, it extends to credit sales solictited of and by Iowa residents in Iowa, notwithstanding that the contract terms declare the contract to be governed by the laws of the state in which the seller is located. It suffices to note that it is necessary for the states to enact reasonable consumer credit legislation to protect this public interest, for "in the power of the lender to relieve the wants of the borrower lies the germ of oppression." 45 Am.Jur.2d **Interest and Usury** § 4 (1969). Moreover, the federal Truth-in-Lending Act expressly recognizes the necessity of state regulations of interest rates in the field of consumer credit by providing:

> This subchapter does not otherwise annul, alter, or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend

> the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.
>
> 15 U.S.C. § 1610(b).

In disposing of the due process argument Judge Hanson reasoned:

> The Court finds that the state does have an interest concerning the contractual relations of its residents with foreign mail order businesses. The state has a legitimate concern to shield its residents from usurious interest charges affixed to their consumer credit transactions with interstate sellers of merchandise; and, this is an interest which the state can safeguard by means of the legislative process notwithstanding the fact that the specific state action may have an effect on the interstate sales of the foreign seller. **Travelers Health Assn** v. **Virginia,** 339 U.S. 643 (1949); **Hoopeston Canning Co.** v. **Cullen,** 318 U.S. 313 (1943); **United States** v. **Aluminum Co. of America,** 148 F.2d 416 (2d Cir. 1945); **Osborn** v. **Ozlin,** 310 U.S. 53 (1940). Aldens' imposition of a usurious interest charge violates the express public policy of the state that no Iowan shall pay more than that prescribed by Chapter 537 on his consumer credit transaction solicited in Iowa. This concern of the state to prohibit usurious loans to its residents is sufficient to surmount the burdens placed on interstate sellers to conform to the provisions of Chapter 537.

Aldens, Inc. v. **Miller,** 466 F. Supp. 379, 383-86 (S.D. Iowa 1979) (footnote omitted).

Aldens urges that since the district court decision and adverse decisions of our three sister circuits, the Supreme Court "shattered" their reasoning in **Marquette National Bank** v. **First of Omaha Service Corp.,** 439 U.S. 299 (1978). That case held Congress, in the specific language of the National Bank Act, 12

U.S.C. § 85, intended to preempt state law. The holding makes it clear that the case is inapplicable to the questions presented here. Justice Brennen point out:

> The question for decision is whether the National Bank Act, Rev. Stat. §5197, as amended, 12 U.S.C. §85, authorizes a national bank based in one State to charge its out-of-state credit card customers an interest rate on unpaid balances allowed by its home State, when that state is greater than that permitted by the State of the bank's nonresident customers.
>
> . . . .
>
> [T]he National Bank Act, . . . and its descendants have been interpreted for over a century to give "advantages to National banks over their State competitors." **Tiffany** v. **Nat. Bank of Missouri,** 18 Wall. 409, 413 (1874). "National banks," it was said in **Tiffany,** "have been National favorites."
>
> . . . .
>
> To the extent the enumerated federal rates of interest are greater then permissible state rates, state usury laws must of course give way to the federal statute.
>
> . . . .
>
> [T]he protection of state usury laws is an issue of legislative policy, and any plea to alter §85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 301, 314, 318 n.31, 319.

The bottom line, as urged by counsel for Aldens at oral argument, is its plea that this circuit create a conflict by stating its disagreement with the analysis of the Third, Seventh and Tenth Circuits, notwithstanding the Supreme Court's summary

dismissal in **Meierhenry** v. **Spiegel, Inc.**, in order to enhance chances of Supreme Court review.

Each of these circuit courts carefully analyzed the constitutional questions; in our judgment their reasoning is impervious to further attack and needs no further amplification. Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our 11 courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system. See dissenting opinion of White, J., in **Brown Transport Corp.** v. **Atcon, Inc.**, 439 U.S. 1014 (1978), and the opinion of Burger, J., appended thereto.

JUDGMENT AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.